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I. Introduction

A U.S. aeronautics museum purchased a vintage World War I airplane in England and arranged to have it shipped from Britain to New York on a British-flag carrier. The bill of lading contained a forum selection clause that read in part: "Any litigation arising out of this bill of lading shall be governed and construed under English law and resolved in an English court. No other court shall have jurisdiction over any such litigation."[1]

Under the agreement, the airplane would be shipped on deck. The carrier failed to properly strap down the cargo, however, and the airplane was severely damaged when it shifted position during heavy weather in the crossing. The shipper would like to bring suit in a U.S. District Court under admiralty jurisdiction, where the potential for recovery would be greater than in the English courts. The carrier, however, asserts its rights under the forum selection clause of the bill of lading to litigate in an English court. How should a U.S. court decide the validity of this forum selection clause?

An analysis of the above hypothetical is fraught with conflict. Whether a court in any country decides to validate a forum selection clause in a bill of lading depends on several variables. First, it may look to any one of three international maritime agreements,[2] depending on whether that

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1. This hypothetical was adopted from one used in the Judge John R. Brown Admiralty Moot Court Competition. The author would like to thank Graydon S. Staring, of counsel to the San Francisco law firm Lillick & Charles, L.L.P., for providing this material and for his helpful suggestions on the topic for this Note.

2. There are currently three international conventions on maritime law. *See* Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, *reprinted in* WILLIAM TETLEY, MARINE CARGO CLAIMS (2d ed. 1978) [hereinafter "Hague Rules"]; Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, (entered into force June 23, 1977), *reprinted in* TETLEY, *supra* [hereinafter "Visby Protocol"]; Convention on the Carriage of Goods by Sea, March 31, 1978, 17 I.L.M. 608 (1978) [hereinafter "Hamburg Rules"]. Each has been ratified by a number of maritime coun-

particular country has ratified any agreement. Next, it may look to its own substantive law on maritime claims, which may be modeled after any of the international agreements or may be domestically generated.[3] Finally, it may look to interpretations of any of these laws in its own domestic courts. Such decisions may either comport or conflict with decisions of courts in other countries in cases based on similar facts.

Interpretation is perhaps the most grievous of these problems, because the application of the same clause from an international convention or an identical clause in a domestic law can lead to two different results in the courts of two countries. Although application disparities occur for a number of maritime law points,[4] the case of the forum selection clause is quite illustrative of this conflict.

For example, while neither the U.S. Carriage of Goods by Sea Act (COGSA) nor the Hague Rules contains a section that would either validate or invalidate a forum selection clause, each contains the following provision:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss, or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability, otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.[5]

The question open to interpretation by domestic courts is whether a forum selection clause constitutes a "lessening of liability," and therefore is invalid. This question would constitute the paramount issue in the above hypothetical. In settling the question of liability, an English court will be bound by the limits set out in the Visby Protocol,[6] which are substantially

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tries.

3. *See, e.g.*, Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207 (1936) (codified as amended at 46 U.S.C. §§ 1300-1315 (1994)) [hereinafter "U.S. COGSA"]. U.S. COGSA is a domestic U.S. maritime law modeled on the Hague Rules.

4. For the necessity of uniformity in maritime laws governing deck carriage, the navigational fault liability, fire liability and other issues, *see* Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729 (1987) [hereinafter "Sturley, *International Uniform Laws*"].

5. U.S. COGSA §3(8); Hague Rules §3(8).

6. Visby Protocol Art. 2 sets a unit limitation amount at 667 SDRs per package or unit, or 2 SDRs per kilogram of gross weight. An SDR is a monetary unit tied to a system that uses a "special drawing right" set by the International Monetary Fund. *See*

higher than those proscribed in the U.S. COGSA.[7] On the other hand, a court deciding this case under U.S. COGSA may hold the carrier to a "fair opportunity doctrine," thus allowing the shipper to argue complete recovery of the cargo's value.[8]

Certainly, choice of forum in this case will affect the carrier's liability. Thus, the District Court in which such a case is brought would have to decide whether moving the case to an English forum as the carrier wants would lessen the carrier's liability, and if so, whether that in turn would violate U.S. COGSA.

This Note proposes to consider the validity of forum selection clauses in bills of lading used in litigation between shippers and carriers of international goods by sea. It will address the problem in four parts. The first part presents an overview of current maritime law, focusing on the three international maritime law conventions and the position each takes in regards to forum selection clauses. Part Two will analyze U.S. law in depth, looking at U.S. COGSA and the resulting line of court cases that have interpreted forum selection clauses in light of that law. Part Three constitutes a comparison of the positions of other maritime nations on the validity of forum selection clauses in bills of lading. Finally, Part Four looks at possible solutions or compromises to the differing interpretations that could bring the lack of uniformity in international law in line.

II. The Current State of International Maritime Law

A. Perceived Need for Uniformity Prompts the Hague Convention

Before the last half of the nineteenth century, worldwide shipping was governed by a hodge-podge of domestic laws and policies that provided no assurances to shipper or carrier of a just treatment in settling any dispute. The first legal attempt to rectify this situation by creating uniformity was made under U.S. law when Congress passed the Harter Act in 1893.[9] The

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Samuel Robert Mandelbaum, *Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods Under the Hague, COGSA, Visby and Hamburg Conventions*, 23 TRANSP. L.J. 471, 482 (1996).

7. U.S. COGSA section 4(5) limits a carrier's liability to "$500 per package . . . or in case of goods not shipped in packages, per customary freight unit." U.S. COGSA § 4(5).

8. The "fair opportunity doctrine" as it applies to carriers is spelled out in: *New York, New Haven & Hartford R.R. Co. v. Nothnagle*, 346 U.S. 128, 135 (1953). It states: "[O]nly by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained."

9. Phillip A. Buhler, *Forum Selection and Choice of Law Clauses in International*

purpose of the Act was to unify the law for goods carried by sea with ports of origin or destination in the United States.[10] The Act specified liabilities and defenses shippers and carriers might use in settling contract disputes and provided that U.S. courts should hear all such claims.[11]

Although the Harter Act provided some certainty for U.S. goods entering and leaving U.S. ports, its provisions conflicted with other nations' laws.[12] The instability this conflict created in the rest of the world led other maritime nations to call a convention in 1921 at the Hague to draft uniform rules that would govern shipping worldwide.[13]

The British government was instrumental in spearheading this effort after its Imperial Shipping Committee issued a report in 1920 that promoted uniform legislation throughout the British Empire.[14] With this report and the Harter Act as a basis, the International Maritime Committee set about drafting uniform rules for maritime shipping nations that resulted in the final version of the Hague Rules signed at the Fifth International Conference on Maritime Law on August 25, 1924.[15]

The purpose of the Hague Rules was to allocate clearly the responsibility for cargo losses in international shipments.[16] In order to allocate losses effectively, the rules set out standard terms that could be incorporated into bills of lading to delegate responsibility for cargo loss and damage in international shipments. Generally under international law, carriers were liable for cargo losses unless certain exceptions applied.[17] The Hague Rules strictly limited protections for carriers, allocating responsibility in their direction and strengthening legal recourse for shippers.[18]

The Hague drafters envisioned that these Rules would settle differences inherent in the common law of the various shipping nations that plagued dispute resolution in cases of questionable liability for cargo loss

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Contracts: A United States Viewpoint With Particular Reference to Maritime Contracts and Bills of Lading, 17 U. MIAMI INTER-AM. L. REV. 1, 15 (1995).

10. *Id.* at 15.

11. *Id.*

12. Mandelbaum, *supra* note 6, at 476.

13. *Id.* at 476-77.

14. J. Hoke Peacock III, *Deviation and the Package Limitation in the Hague Rules and the Carriage of Goods by Sea Act: An Alternative Approach to the Interpretation of International Uniform Acts*, 68 TEX. L. REV. 977, 982 (1990).

15. *Id.* at 982.

16. Sturley, *International Uniform Laws*, *supra* note 4, at 735.

17. Sturley lists the available exceptions as Act of God, act of public enemy, inherent vice of the goods, or fault of the shipper. *Id.* at 735 & n.26.

18. *See id.* at 735.

or damage.[19] The drafters were acutely aware of the different results those varied common laws could create in resolving cargo liability claims. Even contemplation of harmonizing the laws of two similar nations—Great Britain and the United States—caused Sir Norman Hill to remark at the London Shipping Conference Report proceedings in 1921 that, "common sense seems to be influenced by climate, for an English lawyer is quite unable to understand... the manner in which the Judges in the United States will apply the principles of Common Law."[20]

Yet the drafters fully realized the benefits associated with uniformity that still exist for modern carriers and shippers, especially certainty, predictability, convenience, and stability.[21] By carefully defining the responsibility of each party to an international shipment including bankers, shippers, carriers and underwriters, they strived to increase certainty with uniform rules.[22] Furthermore, the drafters hoped uniform rules would simplify commerce[23] as well as reduce insurance costs and litigation.[24]

Despite these perceived benefits, some of the Hague Rules drafters harbored lingering concerns that a uniform law would limit or do away with freedom of contract. Yet in the end, they agreed with the argument of French delegate Louis Franck that a lack of uniformity also effectively limits freedom of contract.[25] Franck spoke for all the drafters in making the following case for uniform maritime legislation:

> [if we have] an International Convention . . . then at least all the shipowners and cargo owners will know where they are, and you will have your ships and your cargoes finding everywhere, in all ports, and on all seas, a clear, intelligible, and fair legislative system which will be uniform everywhere.[26]

B. The Hague Rules

In their quest for a uniform maritime law, the Hague Rules drafters looked to currently existing statutes, basing their rules on a 1910 Canadian statute, which in turn was based on the U.S. Harter Act.[27]

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19. *See* 2 THE LEGISLATIVE HISTORY OF COGSA AND THE TRAVAUX PREPARATOIRES OF THE HAGUE RULES 425 (Michael Sturley ed., Carole Boyle trans., 1990).

20. LEGISLATIVE HISTORY, *supra* note 19, at 181.

21. Sturley, *International Uniform Laws*, *supra* note 4, at 731.

22. Peacock, *supra* note 14, at 986.

23. *Id.* at 986.

24. *Id.* at 986-87.

25. LEGISLATIVE HISTORY, *supra* note 19, at 428.

26. *Id.* at 418.

27. Michael F. Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act*,

The Hague Rules establish a basis on which shipowners are liable for cargo loss and damage. They also prohibit shipowners from contractually exempting themselves from liability, but at the same time provide seventeen defenses for shipowners.[28] As previously noted, they also limit liability to $500 per package.[29]

No provision in the Hague Rules prohibits a forum selection clause, even if the chosen forum is not a signatory country to the Rules, as long as carrier liability otherwise imposed by the Rules is not relieved by the clause.[30] Thus, forum selection and choice of law clauses are valid under the Hague Rules as long as they are not directly violative of any other clause of the Hague Rules.[31]

On the other hand, from the legislative history the Hague Rules drafters clearly did not wish to incorporate enforcement of forum selection clauses.[32] That issue was left to national law, which resulted in application inconsistency.[33]

While Great Britain ratified the Hague Rules almost as soon as they were drafted, the United States hesitated for twelve years before approving a domestic law that paralleled the international one.[34] A year later, in 1937, the United States finally ratified the international convention.[35] By the time World War II began, most European shipping nations had joined the Hague Rules' ratifiers, so that a majority of the world's shipping nations had signed on by the start of the war.[36]

Currently, around seventy-seven nations are in contract under the Hague Rules.[37] Some of these are developing nations, such as the Latin American countries of Argentina, Bolivia, Ecuador, Guyana, Paraguay and Peru.[38] It should be noted that a number of ratifiers also subscribe to the

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18 HOUS. J. INT'L L. 609, 610-11 (1996).

28. Mandelbaum, *supra* note 6, at 477.

29. Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, §4(5), 51 Stat. 233, *reprinted in* TETLEY, *supra* note 2. *See also* Mandelbaum, *supra* note 6, at 477, 488.

30. Buhler, *supra* note 9, at 16.

31. *Id.*

32. Sturley, *Proposed Amendments*, *supra* note 27, at 657.

33. *Id.*

34. Mandelbaum, *supra* note 6, at 477.

35. *Id.*

36. *Id.*

37. *Id.*

38. Buhler, *supra* note 9, at 16. It is worthy of note that Colombia, Venezuela, Brazil and Chile have not ratified the Hague Rules, despite significant maritime economies.

Visby Protocol, which updates the Hague Rules. The Rules and the Protocol are often referred to jointly as the Hague-Visby Rules.

C. The Visby Protocol

The Visby Protocol was promulgated in 1968 by a diplomatic conference as a response to the containerized shipping revolution.[39] In the 1960s, ocean carriers began experimenting successfully with a new method of stowing cargo in eight-by-forty foot metal containers instead of in break-bulk holds as in the past.[40] This new stowage method significantly affected cargo contract liability in many ways, including the limitations of liability per "package."

The Visby Protocol was written to amend and update the Hague Rules to the new shipping techniques.[41] The Visby Protocol preserved the basic Hague Rules, including carrier duties of care and due diligence. Thus, most case law developed under the Hague Rules was also preserved.[42]

However, the Visby Protocol, like the Hague Rules, neglected to preclude use of forum selection clauses in bills of lading.[43] Yet, the Protocol did incorporate the International Monetary Fund's Special Drawing Right (SDR) Protocol,[44] the most significant effect of which was to increase the maximum liability for carriers from the $500 per package under section 4(5) of the Hague Rules to the higher of 667.67 SDRs or 2 SDRs per kilogram of goods.[45] However, incorporation of the Hague Rules without the SDR Protocol can precipitate a grave disharmony. The effect of such incomplete incorporation is to lower carrier liability in contravention of section 3(8) of the Hague Rules.[46]

Many countries that had ratified the Hague Rules subsequently ratified the Visby Protocol as amendments to the original Rules, including Canada, Japan, Singapore, Hong Kong, Australia, China, and most western

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39. Sturley, *Proposed Amendments*, *supra* note 27, at 611. *See also* Mandelbaum, *supra* note 6, at 480.

40. Sturley, *Proposed Amendments*, *supra* note 27, at 611.

41. Mandelbaum, *supra* note 6, at 480.

42. *Id.*

43. Buhler, *supra* note 9, at 31.

44. Sturley, *Proposed Amendments*, *supra* note 27, at 612 n.13; *see also supra* note 6.

45. Mandelbaum, *supra* note 6, at 488.

46. Note that the wording of the Hague Rules §3(8) is identical to that of U.S. COGSA §3(8) quoted above. *See supra* note 5.

European states.[47] In fact, 63.9 percent of all U.S. trade is with a partner who has ratified the Visby amendments.[48]

The United States, however, has not ratified the Visby amendments, and neither have many of her Latin American trading partners.[49] In the United States, two opposing political lobbies complicate ratification. The shippers' lobby desires the heightened liability ensured by the Visby Amendments; while the carriers' lobby adamantly opposes it.[50] Congress appears unwilling to act in the face of this conflict.[51]

D. The Hamburg Rules

In 1978, the United Nations Commission on International Trade Law revised the Hague Rules in a document that became known as the Hamburg Rules.[52] The Hamburg Rules significantly differ from the Hague-Visby Rules and would increase carrier liability.[53] The Hamburg Rules primarily achieve increased carrier liability by affirmatively permitting forum selection clauses that shippers could use to their advantage in litigating cargo loss and damage claims. The only provision is that the chosen forum have jurisdiction to hear the dispute.[54]

Article 21(1) of the Hamburg Rules gives the plaintiff the option of instituting an action in ". . . a court which, according to the law of the State where the court is situated, is competent. . . ."[55] That court may be located in a principal place of business or principal residence of the defendant; the place where the contract was made if the defendant has contacts there; the port of loading or discharge; or any additional place designated for that purpose in the contract of carriage by sea.[56]

In addition, the Hamburg Rules increase carrier liability under the SDR Protocol to 835 SDRs (from 667.67 SDRs under Visby) or 2.5 SDRs per kilo (from 2 SDRs under Visby).[57] The Hamburg Rules further increase carrier liability by restricting use of the term "per package," so that

47. Sturley, *Proposed Amendments*, *supra* note 27, at 612. *See also* Mandelbaum, *supra* note 6, at 491.
48. Mandelbaum, *supra* note 6, at 491.
49. Buhler, *supra* note 9, at 31.
50. Mandelbaum, *supra* note 6, at 481.
51. *Id.* at 481.
52. Sturley, *Proposed Amendments*, *supra* note 27, at 612.
53. Mandelbaum, *supra* note 6, at 482.
54. Buhler, *supra* note 9, at 33.
55. *Id.* at 31.
56. *Id.*
57. Mandelbaum, *supra* note 6, at 488.

it does not apply to an entire container; rather, "package" must refer to the type of package designated in a bill of lading.[58] The Hamburg Rules also favor shippers by allowing damage claims based on weight rather than the value of a package.[59]

Needless to say, the Hamburg Rules appeal mostly to nations that import and export but do not carry their own goods in international trade. Indeed, the greatest criticism of the Hamburg Rules is that few nations have adopted them so far, and no major industrialized nation has adopted them.[60] Thus far, only twenty-two countries have ratified the Hamburg Rules,[61] representing about two percent of U.S. trade.[62] Seven of the ratifiers are landlocked states with no ports.[63] However, it is worth noting that Chile is among the ratifiers. Chile will be among the next signers on the North American Free Trade Agreement and may influence other Latin American nations to sign.[64]

The United States has not ratified the Hamburg Rules,[65] nor is it likely to do so soon. For one, the Hamburg Rules increase carrier liability, thus devastation of what little is left of the U.S.-flag fleet is anticipated.[66] However, if the United States were to adopt these rules, it would have a major influence on their ratification internationally.[67]

III. U.S. Maritime Law: Statutory and Case Law

A. The 1936 Carriage of Goods by Sea Act

The U.S. Congress first dealt with the problem of nonuniformity in maritime law by enacting the Harter Act in 1893.[68] While the adoption of the Harter Act singled out the United States as a world leader in maritime law, the adoption of COGSA was more difficult. Between the 1923 drafting of the Hague Rules and the 1936 adoption of COGSA, Congress tried several times to enact domestic maritime legislation.[69] The 1936 enact-

58. *Id.* at 483.
59. *Id.* at 483.
60. Sturley, *Proposed Amendments*, *supra* note 27, at 614.
61. *Id.* at 612.
62. Mandelbaum, *supra* note 6, at 491.
63. *Id.* at 484.
64. Buhler, *supra* note 9, at 32.
65. *Id.* at 32.
66. Mandelbaum, *supra* note 6, at 500.
67. *Id.* at 491.
68. Buhler, *supra* note 9, at 15.
69. Peacock, *supra* note 14, at 983.

ment of COGSA substantially superseded the earlier Harter Act, although much of the same language has been retained.[70]

COGSA was not primarily intended to change the existing law, but rather to make U.S. law consistent with worldwide maritime law on bills of lading.[71] COGSA generally reflects the language used in the Hague Rules, and is, indeed, identical in most parts.

Aside from uniformity, however, the drafters were also concerned about protecting American shippers engaged in foreign trade.[72] In line with this concern, COGSA's enacting clause and section 13 mandate that domestic law governs all contracts for carriage of goods by sea when the port of entry or discharge is in the United States.[73] To underscore this point, two years after Congress passed COGSA, the United States emphasized, upon ratifying the Hague Rules, that in case of inconsistencies the provisions of COGSA would prevail.[74]

Thus, the policy behind COGSA is not entirely supportive of international law. COGSA will not apply, however, where U.S. shippers or carriers ship goods between two foreign ports unless the parties so stipulate in their bill of lading.[75]

Like the Hague Rules and the Visby Protocol, COGSA does not directly comment on the validity of forum selection clauses.[76] Although a provision in section 3(8) invalidates any clause in a bill of lading that "lessens liability," there is no evidence that this subsection was drafted with forum selection clauses in mind. Indeed, the legislative history lends support to the idea that subsection 3(8) was never intended to govern forum selection clauses.[77]

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70. Christine N. Schnarr, *Foreign Forum Selection Clauses Under COGSA: The Supreme Court Charts New Waters in the Sky Reefer Case*, 74 WASH. U.L.Q. 867, 871 n.32 (1996).

71. Richard C. Mason, Book Review, 7 TEMP. INTL'L & COMP. L.J. 161 (1993) (reviewing MICHAEL F. STURLEY, THE LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT AND THE TRAVAUX PREPARATOIRES OF THE HAGUE RULES (1993)).

72. Alan Nakazawa & B. Alexander Moghaddam, *COGSA and Choice of Law Clauses in Bills of Lading*, 17 TUL. MAR. L.J. 1, 14 (1992).

73. COGSA §1300 and 1312; *see also* Sturley, *International Uniform Laws*, *supra* note 4, at 781.

74. Nakazawa & Moghaddam, *supra* note 72, at 14.

75. Buhler, *supra* note 9, at 26.

76. Elizabeth A. Clark, *Foreign Arbitration Clauses and Foreign Forum Selection Clauses in Bills of Lading Governed by COGSA: Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 1996 B.Y.U. L. REV. 483, 486 (1996).

77. Sturley, *Proposed Amendments*, *supra* note 27, at 657.

COGSA has remained the preeminent U.S. domestic statutory law for maritime issues since its adoption in 1936. Yet, the shipping industry has changed significantly since then, both in terms of technology and economic dynamics. COGSA's failure to keep up with these changes has created the major problem for the Act. A second problem is that, despite its purported purpose of unifying maritime law, varying court interpretations have nullified the symmetry between the U.S. COGSA and the maritime laws of other major shipping nations.[78]

B. Case Law: Interpretation of Choice of Forum Clauses Under COGSA Under the 1967 Indussa *Decision*

Historically, the United States has been reluctant to recognize choice of forum clauses in any context.[79] One of the earliest examples of litigation over choice of forum in maritime law was in *Knott v. Botany Mills*, decided in 1900.[80] In that case, the Supreme Court held that, under the Harter Act, a clause in a bill of lading stipulating that British law would apply where a cargo of wool was carried on a British vessel from Argentina to New York was null and void.[81]

Early U.S. interpretations of the Hague Rules failed to invalidate forum selection clauses despite the reasoning that under subsection 3(8) carrier liability would be "lessened" under such clauses. In *William H. Muller & Company v. Swedish American Line*, the Second Circuit rejected the plaintiff's argument that forcing litigation in Sweden would lessen the carrier's liability because of undue expense on the shipper.[82] The *Muller* court upheld the forum selection clause on independent principles of law, citing the reasonableness of the forum.[83] This reasoning was followed in subsequent cases. In deciding forum selection clause issues in maritime cases, the courts applied general principles of law instead of relying on COGSA or the Hague Rules.[84]

This interpretation changed dramatically when the Second Circuit decided *Indussa Corp. v. S.S. Ranborg* in 1967, citing COGSA subsection 3(8) and finding that its lessening liability language would invalidate fo-

78. *Id.* at 613.

79. Sturley, *International Uniform Laws*, *supra* note 4, at 777.

80. *See* Knott v. Botany Mills, 179 U.S. 69, 76 (1900).

81. Buhler, *supra* note 9, at 14-15.

82. *See* William H. Muller & Co. v. Swedish Am. Line, Ltd., 224 F.2d 806, 808 (2d Cir. 1955).

83. Sturley, *International Uniform Laws*, *supra* note 27, at 778.

84. *Id.* at 782.

rum selection clauses under COGSA.[85] This holding effectively overruled *Muller*, which the court stated had been "wrongly decided."[86]

In *Indussa*, a shipment of nails and barbed wire from Belgium arrived aboard the Norwegian carrier *Ranborg* at its San Francisco destination damaged by rust. A jurisdiction clause in the bill of lading designated the carrier's principal place of business as the forum for litigation of any claims. When Indussa Corp. brought suit *in rem* in the Southern District of New York, the Norwegian shipowners moved to invoke the jurisdiction clause. The Second Circuit refused to honor the clause, holding that, because the claim was so small, requiring removal to a foreign forum lessened the carrier's liability in violation of COGSA subsection 3(8).[87]

The *Indussa* court cited three reasons for its holding. First, the practical difficulties of litigating in a foreign forum place a "high hurdle" in the way of enforcing liability;[88] next, liability will be lessened in any forum where neither COGSA nor the Hague Rules apply;[89] and finally, even where a foreign court will apply one of these two laws, there is no guarantee that the results will be the same as if a U.S. court applies them.[90]

In making its holding in *Indussa*, the court rejected foreign forum clauses because it concluded that Congress intended COGSA to govern all disputes over bills of lading written under its statutes.[91] Thus, the U.S. courts essentially rejected the international maritime law of the Hague Rules, preferring domestic interpretation under COGSA.

U.S. courts persisted in their refusal to enforce forum selection clauses in bills of lading through several similar cases.[92] In *Union Insurance Society of Canton v. S.S. Elikon*, for instance, the Fourth Circuit invalidated a forum selection clause designating a German forum in a dispute over a bill of lading between a German carrier and an American shipper, holding that COGSA applied to the carriage and therefore litigation in Germany was not appropriate.[93] Until 1995, subsequent bill of lading cases continued to follow the *Indussa* reasoning without fail.[94]

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85. *See* Indussa Corp. v. S.S. Ranborg, 377 F.2d 200, 205 (1967).
86. *See id.* at 204.
87. *See id.* at 205.
88. *See id.* at 203.
89. *See id.*
90. *See id.* at 203-04.
91. Nakazawa & Moghaddam, *supra* note 72, at 4-5.
92. Buhler, *supra* note 9, at 25.
93. *See* Union Ins. Soc. of Canton v. S.S. Elikon, 642 F.2d 721, 723-724 (4th Cir. 1981).
94. Sturley, *International Uniform Laws*, *supra* note 4, at 871.

C. *The* Sky Reefer *Decision Reversed the* Indussa *Holding in 1995*

In 1995, the Supreme Court reversed gears on the *Indussa* line of cases when it decided *Vimar Seguros y Reaseguros v. M/V Sky Reefer*.[95] In a complete about face, *Sky Reefer* held that forum selection clauses in bills of lading covered by COGSA are valid, overturning twenty-eight years of precedent.[96]

In *Sky Reefer*, a cargo of fruit from Morocco to New York on a Japanese carrier for a U.S. shipper was damaged en route. A clause in the bill of lading forced arbitration in Japan, but the shipper brought suit in federal district court in Massachusetts. When the Japanese shipowner moved to stay the action and compel arbitration in Tokyo, the matter reached the U.S. Supreme Court, which held the arbitration clause valid.[97] While the actual holding of the *Sky Reefer* concerned an arbitration clause, the court in dictum referred to the *Indussa* holding and indicated it would apply analogous reasoning to forum selection clauses.[98]

The Court subsequently upheld this reasoning in *Effron v. Sun Lines Cruises*.[99] Ostensibly, ruling this dictum into law undermines the broad goals of the U.S. COGSA subsection 3(8), to prevent inappropriate limitations on carrier liability.[100]

In making its holding, the Supreme Court consciously embraced a departure from interpretation under domestic law and towards an internationalist view. In explaining its reasoning, the majority focused on compliance with the internationalist goals of the Hague Rules and on harmonizing U.S. law with that of other countries.[101] The Court also indicated that international policy interests supported its holding, since the United States's reputation in the international community benefits from honoring international obligations, such as the Hague Rules.[102] In addition, the Court referred to other common law countries that have upheld foreign forum selection clauses under the Hague Rules subsection 3(8), implying that this holding brings the United States in line with those decisions.[103]

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95. *See* Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 540 (1995).
96. Schnarr, *supra* note 70, at 868.
97. *See* Sky Reefer, 515 U.S. at 540.
98. *See id.* at 540.
99. *See* Effron v. Sun Lines Cruises, 67 F.3d 7, 11 (2d Cir. 1995).
100. Clark, *supra* note 76, at 485.
101. *See* Sky Reefer, 515 U.S. at 539.
102. *See id.*
103. *See id.*

Although *Sky Reefer* may be more in line with international precedent than *Indussa*, the Court's reasoning takes a leap away from its international counterparts in interpreting subsection 3(8), which is identical in COGSA and the Hague Rules. The *Sky Reefer* Court purports that the term "liability" does not refer to an ultimate cost liability, as it has been interpreted in all previous cases; rather, it proposes the term refers to "legal" liability, or the carrier's duty of due diligence.[104]

The interpretational effect is to nullify those cases in which the cost to a shipper of litigating in a foreign forum was held to "lessen the liability" of a carrier. In accordance with the *Sky Reefer* holding, forum selection clauses will be held valid if a carrier is liable to litigation in the designated forum, regardless of the shipper's projected recovery and expenses. In making this holding, the Court said that COGSA subsection 3(8) had been misinterpreted in previous cases.[105]

IV. Comparison of Other National Interpretations of Maritime Law

A. Great Britain

As is the case with the U.S. COGSA, the British COGSA is substantially identical to the Hague Rules, though Britain has enacted the Visby Protocol amendments.[106] However, the similarity does not bring British court decisions in line with U.S. or international precepts. English court rulings on forum selection clauses are generally made on domestic principles of English law, irrespective of accordance with the Hague Rules or principles of uniformity in international law.[107]

Enforcement of forum selection clauses under English law is variable, and about one-half the cases are enforced.[108] While in general British law favors the carrier, forum selection clauses will not be enforced if the specific forum chosen reduces the carrier's liability in a given case, or when the court considers the chosen forum less appropriate for some other reason.[109]

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104. *See id.* at 536.

105. *See id.* at 534.

106. Carriage of Goods by Sea Act, 1971, ch. 19 (U.K.) [hereinafter "British COGSA"] (enacting Hague-Visby Rules, as amended by Merchant shipping Act 1981, ch. 10, §2 (U.K.) (implementing Brussels Protocol) (superseding Carriage of Goods by Sea Act, 1924, 14 & 15 Geo. 5, ch. 22 (U.K.) (enacting Hague Rules).

107. Sturley, *International Uniform Laws*, *supra* note 4, at 787.

108. *Id.*

109. *Id.* at 783.

The variability of these holdings is illustrated by a comparison of two recent British choice of forum cases. In *The Hollandia*,[110] the court invalidated a forum selection clause where litigation in Amsterdam would have lessened the carrier's liability because of distinct statutory limits in Dutch domestic law.[111] In *The Benarty*, however, the British court enforced a forum selection clause that designated a forum in Indonesia, even though Indonesian domestic law substantially limited the claim.[112] The *Benarty* court reasoned that Article 3(8) of the Hague Rules did not prohibit enforcing the clause.[113]

British courts have shown a reluctance to accept the lessening of liability argument in other cases as well.[114] This may stem from the British perception that choice of forum clauses are inherently a procedural, not a substantive, matter. Because of this kind of thinking, no English court has held that a choice of forum clause is an inherent violation of the Hague Rules Art. 3(8).[115]

In summary, British courts have based their interpretations of the Hague Rules Art. 3(8) on general principles of domestic law, and not on internationalist policy as the U.S. Supreme Court did in *Sky Reefer*. While the results vary from case to case, the reasoning is generally inconsistent with any principles that influence decisions made under identical language in the laws of other nations and the Hague Rules.

B. Australia

Australian domestic maritime laws are an example of laws responding to an industry in transition. Until 1991, Australia acted under its 1924 Sea-Carriage of Goods Act, which banned choice of forum clauses.[116] Enacted in the same year the Hague Rules were ratified, the 1924 Australian act made no reference to the international agreement's provision against lessening liability in Art. 3(8), preferring to handle the choice of forum clause with an explicit national statute.[117]

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110. *See* The Hollandia, 1 Lloyd's Rep. 1 (1982).

111. Sturley, *International Uniform Laws*, *supra* note 4, at 787.

112. *Id.* at 786.

113. *Id.*

114. *See, e.g.*, Maharani Woollen Mills Co. v. Anchor Line, 29 Lloyd's Rep. 169 (C.A. 1927).

115. *See id.* at 785.

116. Sea-Carriage of Goods Act 1924, No. 22, § 9(2) (Austl.).

117. Australia is not the only country to have done this. New Zealand, South Africa, Lebanon and Syria also enacted statutory bans on forum selection clauses. *See* Sturley, *International Uniform Laws*, *supra* note 4, at 776-77.

Australia's subsequent Carriage of Goods by Sea Act of 1991 does an almost complete about-face on this parochial thinking by adopting the most recent international agreements.[118] The Hague Rules as amended by the Visby Protocol were ratified immediately, as was the SDR Protocol. The Act also provided for ratification of the Hamburg Rules after three years, although as of 1996 the Australian Parliament had not yet taken that step.[119]

Although the Australian Parliament commented that its rationale for prospective adoption of the Hamburg Rules was to update Australia's maritime laws in face of new technologies, loading methods, and other practical considerations concerning shippers, it deferred implementation until 1994, at which time it believed the Hamburg rules would have gained greater international acceptance.[120] The Parliament's subsequent failure to enact these rules most likely stems more from the lack of international acceptance than any perception by the Australian government that the rules are inherently problematic or ineffective.

C. Scandinavian Countries

In contrast, Finland, Norway, Sweden and Denmark have taken the unconventional step of substantially adopting the Hamburg Rules.[121] This departure from more conservative maritime law arose from the Scandinavians' belief that the Hamburg Rules were forward-looking.[122] Essentially, domestic maritime law in those nations now represents a compromise between the Hague Rules amended by the Visby Protocol and the Hamburg Rules.[123]

Although at first glance this step seems somewhat incongruous with the Scandinavians' support for uniform international law,[124] it can also be perceived as a cutting edge response to changing technologies and realities in maritime shipping.

The Scandinavian law implements all the jurisdictional provisions of the Hamburg Rules, including enforced choice of forum clauses.[125] However, they do not incorporate the stepped-up liability limits of the Hamburg

118. Mandelbaum, *supra* note 6, at 491.
119. *Id.* at 491-92, 492 n.170.
120. *Id.* at 492.
121. *Id.* at 493.
122. *Id.*
123. Sturley, *Proposed Amendments*, *supra* note 27, at 661 n.282.
124. *Id.*
125. Mandelbaum, *supra* note 6, at 494; *see also supra* notes 53-56.

Rules. Under these laws, liability limits remain the same as they had been under the Hague-Visby regime.[126]

V. Two Recommendations Towards a Uniform Interpretation of Forum Selection Clauses in Bills of Lading

A. The United States Should Act to Replace COGSA

As presently codified, the U.S. COGSA is outmoded both as a method of risk allocation[127] and as a reflection of modern transportation technologies and practices.[128] Although it represents only one voice among the world's trading nations, U.S. trade is substantial and its impact influential. Thus, an update of its domestic maritime shipping law would help set a foundation for increased uniformity and modernization of maritime shipping law worldwide.

Neither Congress nor the international transportation and trade community is unaware of this situation. Thus, in 1992 the Maritime Law Association of the United States ("MLA") formed an ad hoc committee to formulate a proposal to update COGSA which could be presented to Congress.[129] The proposal would retain existing law largely unchanged, but would introduce some elements in common with the Hague/Visby regime and clarify some domestic judicial doctrine inconsistent with international law.[130] The result would be an updated U.S. domestic law, but current problematic gaps with international law would still remain.[131]

The proposed COGSA would specifically address the choice of forum problem by codifying a new statute that would invalidate a choice of foreign forum any time a shipment enters or departs from a U.S. port or a carrier receives or delivers goods in the United States.[132] Foreign forum selection clauses would still be governed by general maritime law, and not the proposed 3(8), however, if a claimant brought suit in the United States because jurisdiction over the carrier was only obtainable there.[133] Additionally, the proposed COGSA would accept the liability limits of the Visby Protocol.[134]

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126. *Id.*
127. *Id.* at 498.
128. *Id.* at 497.
129. Sturley, *Proposed Amendments*, *supra* note 27, at 616.
130. *Id.* at 621.
131. *Id.*
132. *Id.* at 658. For specific wording of the proposed clause, *see id.* at 676-77.
133. *Id.*
134. Mandelbaum, *supra* note 6, at 496.

Congress and the maritime community generally believe that the United States must take a more international approach to maritime law.[135] The Supreme Court also supported this thinking in the *Sky Reefer* decision.[136] The merit of the proposed new COGSA is that it furthers that goal by incorporating more law from international sources in U.S. domestic maritime law. Moreover, the principal source incorporated—the Visby Protocol—is much more modern than the 1924 source of the current COGSA.

The problem, however, is that the proposal does not reach far enough. On the issue of forum selection, for example, it takes the parochial view of codifying domestic law as paramount; whereas, the clear mandate of *Sky Reefer* is to validate a foreign forum selection if appropriate.[137] Following this decision, the Supreme Court's interpretation has been in discord with domestic maritime law, and the proposed new COGSA would not remedy that situation.

A better approach would be to adopt an international agreement as domestic law that would bring the U.S. in line with trading partners and harmonize U.S. domestic law with the Supreme Court decision in *Sky Reefer*. To this end, the MLA has recommended adoption of the Visby Protocol.[138] The Visby Protocol has the advantage of being written in response to containerized shipping, and so addresses modern problems more adequately than the Hague Rules or present U.S. COGSA.[139] Additionally, it has been adopted and implemented by all major U.S. trading partners.

Although adoption of the Visby Protocol would synchronize U.S. law with other maritime trade nations, it has significant failings, like the proposed new COGSA. While Visby is more modern than current law, it still was written in 1968. Meanwhile, world trade patterns and transportation modes have changed greatly. Furthermore, the Visby Protocol does not address the issue of choice of forum clauses, leaving it to domestic courts just as the Hague Rules did.

Adoption of the Hamburg Rules, written in 1978, would provide a more modern approach to maritime law. The Transportation Claims and Prevention Council, a U.S. shippers' association, has advocated this approach in Congress.[140]

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135. Mason, *supra* note 71, at 162.
136. Buhler, *supra* note 9, at 32.
137. *See* discussion of Sky Reefer *infra*.
138. Sturley, *Proposed Amendments*, *supra* note 27, at 614.
139. *See* discussion of the Visby Protocol *infra*.
140. Sturley, *Proposed Amendments*, *supra* note 27, at 614.

Adoption of the Hamburg Rules has several advantages for the United States. First, it is the most modern and forward-looking of all international maritime conventions, written with recently-adopted and future technologies, such as multimodal transportation and EDI, in mind.[141] Second, it is the only international maritime convention to take a clear position on the forum selection issue, thus giving a bright line rule and clarifying that issue for domestic courts.[142] Third, the Hamburg Rules position, that forum selection clauses in a contract should be held valid, is consistent with the Supreme Court's decision in *Sky Reefer*. Therefore, adoption of this convention would give weight to that decision and bring U.S. judicial interpretation in line with domestic maritime law.

Carriers do not like the higher liability provisions of the Hamburg Rules, arguing that they are confusing and inconsistent.[143] Due to this resistance, Congress is unlikely to wholeheartedly embrace these rules without some persuasion,[144] especially since few U.S. trading partners have adopted them.

However, good arguments for adoption of the Hamburg Rules exist. One is that worldwide adoption may be imminent if the United States takes the lead.[145] Australia's readiness to adopt these rules has already been noted. Canada, too, enacted a new Carriage of Goods by Water Act in 1993,[146] with a provision to review adoption of the Hamburg Rules in five years. Because the United States is Canada's second-largest trading partner for goods carried by sea, U.S. approval of the Hamburg Rules would be influential at the Canadian adoption review.[147]

Hamburg Rules opponents make the argument that Canada, Australia and other potential Hamburg Rules adopters are not important U.S. trading partners.[148] However, the United States should scrutinize this contention in view of the changing world markets, as recognized by the U.S. Supreme Court in *Sky Reefer*.[149]

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141. Mandelbaum, *supra* note 6, at 486.
142. *See* discussion *infra*.
143. Mandelbaum, *supra* note 6, at 490.
144. *Id.* at 498.
145. *See infra* note 65.
146. Mandelbaum, *supra* note 6, at 492.
147. *Id.*
148. *See* discussion *infra*.
149. Buhler, *supra* note 9, at 30.

B. An International Convention to Lay the Groundwork for Interpretation of Maritime Law.

Even when international law is clear, domestic courts may feel bound to interpret it as consistent with domestic law,[150] thus breaking international uniformity and creating confusion on a global scale. This situation may exist even when a nation ostensibly commits to a uniform interpretation of international conventions. English courts, for example, have held that domestic precedent does not govern interpretation of the Hague Rules.[151] In cases such as *Stag Line, Limited v. Foscolo, Mango & Company*, however, they have indeed used precedent to guide such interpretation.[152]

Rather than a convention to draft more modern maritime law, an international convention to draft guidelines for interpretation of the current law would better address the parochial interpretation impulse. Forum selection clauses are a case in point. Much confusion has been created by varying domestic interpretations of the "lessening of liability" language in the Hague Rules Art. 3(8).[153]

This problem might be resolved in two ways. First, terms, like lessening liability, that generate significant litigation should be more clearly defined by an international body. In the case of forum selection clauses, these should include definitions of "liability," and what it means to "lessen" liability.

Second, guidelines for interpretation in ambiguous cases should be clearly spelled out. As an illustration of the benefit derived, consider that English courts have formerly been unable to rely on the legislative history of the Hague Rules in interpreting cases because of traditional legal methodology in that forum.[154] Reliance on intent of the drafters, however, is much more conducive to uniformity in international law than relying on domestic precedent.[155] Thus, more uniformity might be achieved by drafting international guidelines to interpretation that advocate using the intent of the framers in interpreting unclear clauses in international conventions.

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150. Sturley, *International Uniform Laws*, *supra* note 4, at 733.
151. Peacock, *supra* note 14, at 1000 n.187.
152. *Id.*; *see* (1932) A.C. 328, 350 (1931).
153. Sturley, *International Uniform Laws*, *supra* note 4, at 796.
154. *Id.* at 740.
155. Peacock, *supra* note 14, at 1002.

V. Conclusion

In *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, the U.S. Supreme Court set forth an internationalist policy for interpreting forum selection clauses in maritime bills of lading.[156] According to the Court, the United States should avoid domestic interpretations of international agreements as a matter of policy if it intended to gain respect in the international community.[157] Underlying this policy was a recognition of the increasing importance of the global marketplace even for small and medium-sized businesses.[158]

Given this recognition, the United States should look toward updating its outmoded domestic maritime law, the 1936 COGSA. For forum selection clause issues, replacing the U.S. COGSA with the Hamburg Rules, which clearly delineate an internationalist approach to choice of forum clauses, would be a step forward.

However, adoption of the international convention only addresses a part of the problem. Adoption must be coupled with international guidelines for the interpretation of that law. Only when the courts of each forum cease to look principally to domestic law and begin to use the same methodologies and definitions in interpreting international conventions will choice of forum clauses have meaning in maritime bills of lading.

156. *See* Sky Reefer, 515 U.S. at 538.
157. *See id.*
158. *See id.* at 537.